# No. 18644

IN THE

# United States Court of Appeals

For the Ninth Circuit



PORT OF PASCO,
a municipal corporation,
*Appellant,*

vs.

PACIFIC INLAND NAVIGATION CO., INC.
*Appellee.*

No. 18644

*On Appeal from the District Court of the United States, for the Eastern District of Washington, Northern Division*

## APPELLANT'S REPLY BRIEF

JEROME WILLIAMS
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*Proctors for Appellant*
1121 Paulsen Building
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## APPELLANT'S REPLY BRIEF

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### 1. QUALIFICATIONS OF A COAST GUARD CERTIFICATED TANKERMAN.

Despite what appellee has to say in its brief as to instructions allegedly given its tankermen regarding the hazards associated with electrical malfunctions on its gasoline barges, the fact is, as we will discuss in more detail at a later point, that appellee gave no positive instructions in this area, but simply relied upon its tankermen to deal instinctively with any such problems. In what must be an effort to justify

this reliance on its tankermen, appellee went to considerable lengths in the record and in its brief to point up that these men, Oldfield and Bunce, had been issued certificates as tankermen by the United States Coast Guard.

Thus a consideration of the Coast Guard requirements for such a certificate would seem to be indicated, and these are to be found in Title 46, Code of Federal Regulations, §12.20, where, under "General Requirements," the applicant for such a rating is only required to furnish satisfactory evidence "that he is trained in, and capable of performing efficiently the necessary operations on tank vessels *which relate to the handling of cargo*" (Italics ours). The "Examination Requirements" thereafter set forth in the regulations are as follows:

> "An applicant for certification as tankerman must prove to the satisfaction of the Coast Guard by an oral or written examination conducted only in the English language, that he is familiar with the general arrangement of cargo tanks, suction and discharge pipe lines, valves, cargo pumps and cargo hose, and has been properly trained in the actual operation of cargo pumps, all other operations connected with the loading and discharging of cargo, and the use of fire extinguishing equipment."

Nowhere in the Coast Guard regulations is there any requirement that a certificated tankerman should have any knowledge concerning electrical circuits or the function of safety devices such as circuit breakers, or that they should demonstrate an ability to cope with electrical malfunctions. If we were here

concerned with a safety problem involving the malfunction of the valves or pipe lines, then appellee might with some justification claim the right to assume that its certificated tankermen could, on their own and without benefit of instructions from management, safely deal with such a problem. But certainly appellee had no right to so assume with respect to problems associated with electrical circuits.

It is worthy of note that appellee's witness, Captain House, who occupied a supervisory position with Washington Tug & Barge Company of Seattle, and on whom appellee heavily relies, testified that he, like appellee, did not instruct his employees as to dealing with electrical malfunctions because—

> "I knew that these men did not have to be told certain things because when they get their certificate from the Coast Guard they are well versed in safety and this is, of course the electrical system, the exhaust system, the bonding cable, etc. Many things on a gas barge the average layman would not understand because the man holds a certificate he knows when he is within a safe or unsafe area in what he is doing" (Tr. 311).

Later Captain House conceded that he did not know to what extent the Coast Guard investigates the qualifications or capabilities of a man before licensing him as a tankerman (Tr. 313-314). Thus Captain House and his company are guilty of the same carelessness as appellee in assuming anything concerning their employees' capabilities in the electrical field simply on the basis of their certification as tankermen by the Coast Guard.

## 2. STATEMENTS IN APPELLEE'S BRIEF WHICH ARE UNSUPPORTED BY THE RECORD.

Appellee's brief abounds with statements either totally without support in the record or which represent an unjustifiably liberal interpretation of matters contained in the record. Space limitations do not permit us to deal separately with all of these instances, but we will here refer to those unsupported statements having to do with matters of vital importance to appellee's position.

(a) At page 3 of its brief, appellee says:

> "Instructions had been given that the maintenance man and tankermen were to call *any* electrical malfunction on the barges to the attention of the supervisor of the Pasco terminal of appellee * * *."

There is absolutely nothing in the record which justifies this statement. The supervisor of appellee's Pasco terminal, Mr. Williamson, testified as follows:

> "Q. And what was the instruction or orders which were given to Mr. Oldfield concerning such work? A. Anything that he felt he could not do, he was not capable of doing, to contact me and we would go from there" (Tr. 202).

He further testified as follows:

> "Q. Well, Mr. Williamson, you had never instructed Mr. Oldfield to call to your attention any electrical malfunction he encountered? A. Yes sir. Q. You had instructed him to tell you if he had trouble with it? A. Major problems. Q. Well, did you make any attempt to tell Mr. Oldfield what he should consider a major problem? A. As a maintenance man he knowed what

on our barges. Q. He knew what it would be? You felt that he knew so you did not tell him what you considered a major problem? A. That is correct. Q. I see. As a matter of fact, what you had instructed him to do in your own words as you testified to previously in this case, you had told him to try to fix what he could. A. Exactly. Q. That was your very words, wasn't it? Do you recall that was your very words in the earlier trial, that you simply told Mr. Oldfield to try to fix what he could? A. To repair what he could, what he feels in his own mind was. Q. I see, so there was no reason for Mr. Oldfield to come and tell you about this replacement of the circuit breaker that he undertook, was there? A. No sir. Q. No, he was following your instructions, wasn't he. A. Yes sir" (Tr. 209-211).

Mr. Oldfiield testified:

"Q. Well, Mr. Oldfield, in substance, what your instructions had been prior to this explosion from Mr. Williamson, who was your manager at Pasco, or Mr. Boyles, who was the superintendent from Vancouver, I believe in substance your instructions were to fix what you could, wasn't that about it? A. That is right. Q. And they left it to your judgment, didn't they, as to what you were to do in the face of an electrical malfunction, you yourself to make the decision as to how far you should go. A. Yes. Q. Yes, and that was in accordance with their instructions to you, wasn't it? A. Yes" (Tr. 185-186).

(b) At page 5 of its brief, appellee says:

"There had been no report to any of the management or supervisory personnel concerning any difficulty encountered by the maintenance-man or tankermen with the starboard electrical wiring circuit which resulted in replacement of the circuit breaker switch."

This same statement is repeated elsewhere and appears to us to represent an attempt to suggest that Oldfield and Bunce were derelict in their duty or violated some instruction in failing to report the incident. The fact of the matter is, however, that Oldfield and Bunce made no report of it for the simple reason that they had never been told to report such matters. Rather, as just pointed out, Oldfield had been told "to fix what he could," and as Supervisor Williamson testified, there was no reason for Oldfield to report the replacement of the circuit breaker which he undertook (Tr. 210-211).

(c) At page 8 of appellee's brief, it is again said:

> "It was definitely understood between the supervisory personnel and the maintenance man and tankermen that the latter employees were to call the attention of Superintendent Williamson to any electrical malfunction."

We have already dealt with this misstatement. There is utterly no testimony in the record that these subordinate employees were ever instructed to report "*any* electrical malfunction." Rather, as the record clearly reveals, it was left up to Oldfield to decide whether any trouble was of sufficient importance to report and if, in his untrained judgment, he considered the problem less than a major one he was to attempt to deal with it without reporting (Tr. 185-186, 209-211).

(d) Also at page 8, appellee says:

> "Also, it was understood and specified that the maintenance man and tankermen were to restrict

> their activities on the electrical system on the barges to replacement of light globes, running cords and similar work. * * *"

Again it would seem that appellee is attempting to suggest that these subordinate employees, in replacing the circuit breaker, were violating instructions so as to place the fault for the explosion beyond the privity of appellee corporation. The vice of the foregoing statement lies in the inclusion of the maintenance man (Oldfield). Mr. Williamson's testimony on this point was in fact as follows:

> "Q. And what instructions were given to these personnel regarding those items? A. Well, the instructions were to replace light globes, running light cords, replace, anything that was major, Mr. Oldfield would be called in to check it over" (Tr. 201).

The record most certainly does not support any statement that *Oldfield* was to so restrict his activities on the electrical systems. Rather, as previously pointed out, he was given a general license to "fix what he could" (Tr. 185, 210).

(e) At page 13, appellee says:

> "In addition, Supervisor Boyles stated that he knew maintenance man Oldfield and tankerman Bunce were well aware of the dual functions of circuit breakers as a switch and as a warning device."

It is true that Mr. Boyles, in the course of cross-examination, testified to the effect that he did not advise or discuss with these subordinate employees the dual function of circuit breakers, and volunteered

that "they did not need to be told, they knew that as well as I did" (Tr. 248).

By this indirect route appellee is attempting to suggest to this Court that Oldfield and Bunce did have an awareness of the dual function of these devices, whereas they at no place so claimed, *and the binding finding of the State Court was that these men did not have such knowledge* (Tr. 68).

(f) At page 17 appellee attempts, by various statements, to contend that Mr. Oldfield had considerable skill as an electrician. The fact was, as testified to by Mr. Oldfield, that he had been engaged in general maintenance work throughout his working life except for a period of two years during which he was employed by the California Oregon Power Company as an electrician's helper or "grunt," which job involved the passing of tools to the linemen who were stringing dead transmission lines (Tr. 190). Mr. Oldfield frankly acknowledged that his qualifications in electrical maintenance were limited to simple things such as replacement of sockets or switches, and Supervisor Boyles did not regard him as a skilled or qualified electrician (Tr. 191, 247).

(g) Also at page 17 appellee says:

> "Oldfield acknowledged in his testimony that he had received verbal instructions from his superiors in the company regarding safety procedures and precautions on maintenance and repair including electrical systems in the barges."

Appellee cites Tr. 182-183 in support of this state-

ment, but there is nothing on those pages or elsewhere in the record as to any instructions of any kind to Oldfield as to *safety procedures and precautions* with respect to the *electrical systems.* Mr. Oldfield simply testified that his instructions were "to do no major repair" and to "fix what he could" (Tr. 183). Supervisor Williamson agreed that these were his instructions to Oldfield (Tr. 202, 210).

(h) At page 26 appellee asserts that Oldfield "had considerable experience with electrical wiring and circuit breakers." There is utterly nothing in the record to support any claim that Oldfield had any experience whatsoever with electrical wiring or circuit breakers, or any experience at all in the electrical field beyond simple maintenance, and this statement, like so many others made by appellee in its brief, is nothing more than an obvious attempt to ignore and at the same time contradict the State Court's binding finding of fact which placed beyond issue the extent of Mr. Oldfield's knowledge of the function of circuit breakers as safety warning devices.

(i) At page 27 of appellee's brief, it is said, "appellee did give warnings and issue instructions to its maintenance and operations personnel with respect to electrical malfunctions notwithstanding the unsupported contention of appellant to the contrary." As to this we again say, without fear of successful contradiction from the record, that there is not one iota of testimony as to any *warnings or instructions* as to electrical *malfunctions.* There is some vague

testimony that electrical *maintenance* was discussed in meetings, but specifically on this critical issue there is the testimony of all appellee's witnesses, supervisory and subordinate, that the sum and substance of the instructions to Mr. Oldfield were to "fix what he could" and to do "no major repair," it being left entirely to Mr. Oldfield to determine what constituted major repair work.

## 3. APPELLEE'S ARGUMENT IN SUPPORT OF FINDINGS, CONCLUSIONS AND DECREE (Appellee's Br. pp. 5-18).

### (a) Appellee's Preliminary Statement.

In the opening paragraph at this point, appellee completely misstates our basic position. The single question presented by this appeal is not "whether the findings of the District Judge entitled appellee to a limitation of liability" as appellee suggests, but rather, as our opening brief clearly shows, whether the findings themselves are justified by the record *including the admitted facts contained in the pre-trial order.* This misstatement is in line with appellee's total failure to refer at any point in its brief to the pre-trial order, or to the State Court proceedings to the extent that those proceedings were binding and conceded to be binding on appellee.

The findings of the District Judge were, of course, prepared by appellee's counsel and in many respects are directly contrary to the admitted facts contained in the pre-trial order. We will presently discuss some

of these instances. However, we trust that this Court will not be misled by the opening paragraph of appellee's preliminary statement at page 5, or conclude that we are only questioning the legal effect of the findings of the District Judge. This is definitely not so; we question the findings themselves.

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Appellee also suggests at this point that there is some insufficiency in appellant's specifications of error. The findings of the District Court, as prepared by appellee's counsel and entered by the court, are thirty in number and occupy fifteen typewritten pages. We are certain that this Court intends its rules to be intelligently applied and that, in this case, no useful purpose could have been served and many pages of the brief absorbed by assigning error to every possible questionable statement in the thirty separate findings. We are confident that our position is made clear to the Court by our specifications of error.

We assume that appellee is by this process attempting to gain advantage through Finding of Fact XX against which no separate specification of error was lodged by us. That finding, on which appellee relies in its brief, was as follows:

> "That the tanker man and the maintenance man employed by petitioner, who were engaged in the discharging of bulk gasoline from Barge 535 immediately prior to and at the time of the accident on December 16, 1958, and who were engaged in the maintenance operations involved in the replacement of a circuit breaker in the condulet installed in the stern of Barge 535, were

competent and experienced in the duties required of them by petitioner" (Tr. 126).

In not taking specific exception to Finding XX, we deemed it simply a finding that these men were competent and experienced to perform the specific duties spelled out to them by appellee in the loading and unloading of cargo and in maintenance. Since appellee, by the undisputed evidence, never spelled out to these men what they were to do in the face of an electrical malfunction, we deemed this finding to in no way be at odds with our basic position that these men were incompetent and inexperienced as to the handling of electrical malfunctions of the sort here encountered.

Finding XX, if it is to be given the meaning which appellee seeks to ascribe to it, flies directly in the face of the admitted fact contained in the pre-trial order that " * * * the aforesaid employees of defendant, Oldfield and Bunce, did not possess sufficient skill or understanding of things electrical so as to realize that the circuit breaker switch, by so tripping, was giving notice or warning of a defective or shorted condition on the said starboard deck light circuit * * *." We cannot conceive that admitted facts can be altered by a subsequent finding. This attempt by appellee to attach certain meaning to certain language in one of the thirty findings is the very reason why we specified error to the findings as a whole, and we respectfully submit that our specifications of error, as made, have served the purpose intended by this Court in its rules.

### (b) Finding of Fact XXV.

On pages 6 to 12 appellee attempts to support this finding as entered by the District Judge, and we will separately deal with appellee's five sub-headings at this point. First, however, we unqualifiedly say that there is absolutely nothing in the record to support this finding insofar as it relates to the precise area with which this case is concerned. It is true that appellee offered evidence as to written instructions to its employees and as to meetings with its employees in which safety considerations were discussed, but appellee's own supervisory employees, and Mr. Oldfield, all testified that there were no instructions, education or warning with respect to the circuit breakers. Mr. Oldfield testified:

> "Q. Nobody had ever told you specifically, either Mr. Boyles or Mr. Williamson, or anybody else in the management of the Inland Navigation Company, had ever told you specifically what you should or should not do if this circuit breaker tripped, had they? A. No" (Tr. 186).

Mr. Williamson, the plant supervisor at Pasco, testified:

> "Q. Yes, now, Mr. Williamson, I believe you already testified that you never had any discussion with Mr. Oldfield as to what he was to do when one of these circuit breakers tripped? A. Not to my recollection, a circuit breaker, what we do, no, to my recollection no. Q. Yes. Nor did you ever have any discussion with him as to this circuit breaker device being a warning system, did you. A. No. Not that I can recall. * * * Q. Any of your superiors, Mr. Boyles or any of the other executives of this company that ever

discussed with you what should be done when one of these circuit breakers tripped? A. Not that I can recall. Q. Any of these executives of the company, Mr. Boyles or anybody else that ever had any discussion with you as to just what the warning function of this circuit breaker was? A. Not that I can recall" (Tr. 211-212).

Mr. Boyles testified:

"Q. Yes, now, did you ever, prior to December 16, 1958, ever issue any written instructions to these men at Pasco with respect to describing to them the function of a circuit breaker in this tripped position and what it meant in terms of warning? A. No. Q. You recognized it as a warning, didn't you, when this was in a tripped position, a warning that something was wrong? A. Yes. Q. Did you ever personally in these discussions you say you had with the men at Pasco, did you ever, personally, discuss with them, take any of them out, show them or point out to them on this circuit breaker, or discuss with them just what a circuit breaker was for and what it meant when it tripped? A. No" (Tr. 245).

Before passing to the appellee's five sub-headings, we call the Court's attention to the words "probable hazards" in Finding XXV. It needs no citation of authority that the care to be exercised in a particular situation is commensurate with the danger, and that great care is required in order to meet the legal standard of ordinary care when dealing with an explosive substance such as gasoline. We suggest that appellee had more than a duty to simply warn its employees of "probable hazards," although we would regard the re-energizing of a circuit on a gasoline barge on which

the breaker had tripped as in fact involving a probable hazard of explosion.

Under sub-heading 1, in its attempt to support Finding of Fact XXV, appellee refers to Exhibit 12, appellee's Rules and Regulations which were in use at the time of the explosion. Upon examination this Court will find that there is nothing in Exhibit 12 as to safe procedures to employ in the face of electrical malfunctions, particularly during the critical periods when gasoline is being loaded or unloaded. We are here talking about the particular area of electrical malfunction and tripping of circuit breakers, and there were no instructions on these subjects, either contained in these rules or elsewhere. It goes without saying that it matters not how careful an individual or a corporation may be in other matters, if guilty of carelessness or negligence in the particular area which caused the damage.

Under sub-heading 2, appellee points to the barge inspection reports, Exhibit 13, particularly that portion requiring the visual inspection of the electrical wiring circuits before and during unloading. This form, the Court will observe, requires no more than a visual check to see whether any fixtures or light covers are broken and, in fact, invites the tankermen to take corrective action such as resulted in the disaster here. There is certainly nothing contained in Exhibit 13 which constitutes any instructions to the employees or warning of the hazards incident to meddling with the electrical circuits before or during unloading.

Under sub-heading 3, appellee points to that portion of Exhibit 15 which reads: "If any discrepancy in the barge or the pumping of the barge, stop pumping and contact man in charge." This language is so general as to be meaningless, and in any event this instruction was being disregarded and knowingly violated when the supervisory personnel instructed Mr. Oldfield to "fix what he could" (Tr. 185, 210).

Under sub-heading 4, appellee again refers to the oral discussions and meetings in which safety and maintenance were discussed, and appellee at this point makes the absolutely incorrect statement that the maintenance man and tankermen "were to call the attention of Superintendent Williamson to *any* electrical malfunction," and the similarly incorrect statement that the maintenance man was to restrict his "activities on the electrical systems of the barges to the replacement of light globes, running cords and similar work." Both of these statements are completely unwarranted by the record which discloses without question that maintenance man Oldfield was given specific permission by both Superintendent Williamson and Supervisor Boyles to go ahead on his own with electrical malfunctions and "fix what he could" (Tr. 185, 210).

Finally, appellee's sub-heading 5 is a reiteration of the testimony as to the periodic meetings at which the general subject of safety and maintenance procedures was discussed. Appellee still does not and is unable to point to any place in the record where

the supervisory employees ever claimed to have instructed or warned the subordinate employees as to the hazards of electrical malfunctions, or what to do in the face of electrical malfunctions in general or the tripping of circuit breakers in particular. Also under this sub-heading appellee refers to the testimony of Captain House of the Washington Tug & Barge Company at Seattle. Captain House testified with respect to customary procedures in the replacement of such a circuit breaker, but a careful examination of his testimony will disclose that he was unfamiliar with the equipment here involved and that his experience related to circuit breakers and fuses on tug boats, rather than on barges where gasoline was being carried. We also suggest that if the company by whom Captain House is employed is conducting this same extra-hazardous business without giving any consideration to the ability of its tankermen to cope safely with electrical malfunctions simply because they hold tankerman certificates from the Coast Guard, then it is equally guilty of negligence and carelessness.

We have no quarrel with the cases cited by appellee on pages 9 to 12 of its brief, but each case must stand on its own feet, and none of the cases cited involve a claim of negligence based on a failure to instruct or warn subordinate employees. We respectfully submit that appellee's arguments in support of Finding XXV of the District Court, as contained on pages 6 to 12 of its brief, are without substance and that this key finding is wholly inconsistent with and un-

supported by the record, including those findings of the State Court which formed a part of the admitted facts in the pre-trial order.

### (c) Finding of Fact XXVIII.

At pages 12 and 13 of its brief, appellee attempts to support this finding of the District Court reading as follows:

> "That petitioner was not in privity with any act or failure to act of the tankermen and maintenance men employed by it which the court in Cause No. 10527 may have found to have been the proximate cause of the accident."

This finding is the sort of catch-all language ordinarily employed by the successful attorney in drafting findings for a trial court. It includes the fallacious assumption that the State Court found the proximate cause of the explosion to have been some act or failure to act of the subordinate employees, whereas the State Court, in fact, found only that the appellee's failure to instruct and educate the subordinate employees was the proximate cause of the explosion. Otherwise this finding is in reality a conclusion of law as to the ultimate issue of whether or not appellee was in privity with the negligent causation of this explosion as determined by the State Court.

Appellee attempts to support this particular finding by again referring to the fact that maintenance man Oldfield had not reported the difficulty with the circuit breaker to any of the supervisory personnel. Appellee apparently is arguing that because the su-

pervisory personnel had no actual knowledge of the difficulty, they could not be in privity. Again this is another manifestation of appellee's "head-in-the-sand" attitude with respect to the single theory upon which this case has been prosecuted, that being *the failure of appellee's management personnel to adequately instruct and warn its employees.*

We are cognizant of the disavowal by appellee's Supervisor of Terminals, Mr. Boyles, of actual knowledge of the hazard of re-energizing a circuit on one of these barges where the breaker had tripped. This occurred at a single point in his testimony, but we submit that his overall cross-examination will demonstrate that he in fact had knowledge of the existence of the hazard of such an act. Irrespective of this, however, cases such as this are not to be defeated by such easy denials of actual knowledge. As pointed out by this Court in *States Steamship Co. v. U. S.,* 259 Fed. (2d) 458, 466,

> "Within the meaning of the section of the statute limiting liability, 'knowledge means not only personal cognizance but also the means of knowledge—of which the owner or his superintendent is bound to avail himself—of contemplated loss or condition likely to produce or contribute to loss, unless appropriate means are adopted to prevent it.' "

We are also aware that at one point in his testimony appellee's expert electrical witness, Mr. Holt, characterized the chances of the triggering of an explosion in the way in which the State Court found this explosion to have been triggered, as "remotely

possible." The causation of this explosion, as found by the State Court, is among those facts conceded by appellee to be binding and cannot be impeached by such a characterization on the part of a witness. Moreover, we suggest that the quantum of care required of one transporting gasoline must include a consideration of possible, as well as probable, sources of disastrous explosions.

### (d) Finding of Fact XXIX.

At pages 14 to 16 of its brief, appellee attempts to support this finding, which again would appear to be more of a conclusion of law. At this point appellee deals with its evidence as to customary practices in its industry. We recognized in our opening brief, and here recognize, that evidence of custom in an industry is admissible, but again point out that such evidence is never controlling. We are certain it will not be regarded as controlling, if this Court reaches the conclusion, as we feel it should, that appellee's failure to adequately instruct and warn its employees in this particular area was patently negligent, irrespective of any conformance to industry practices.

Also at this point appellee refers to the following observation of the District Judge during the course of the trial:

> "How does he find it? Suppose he tested and never did find it, wasn't he at fault? If it is intermittent, it is just as hard for an electrician to find it as anyone else" (Tr. 266).

The District Judge, in making this observation, was unmindful of the evidence that the use of the deck lights served by this circuit breaker was not necessary to the unloading operation but a mere convenience, and that this explosion could have been averted by a simple instruction to appellee's employees that the deck lights were not to be used during unloading if, by the tripping of a circuit breaker or by some other indication, it appeared that something might be amiss in the deck light circuit. At no time was it our position that this deck light circuit should have been tested by an electrician prior to or during the unloading for the purpose of endeavoring to find what was wrong, as that would obviously have involved a concommitant hazard. As pointed out by appellee's Superintendent, Mr. Boyles, attention to such matters is deferred until the barge has been rendered "gas free" (Tr. 249).

### (e) Finding of Fact XXX.

At pages 16 and 17 appellee attempts to support this finding. Since it seems to be substantially the same as Finding XXV, we will rest upon what we have said as to that finding. In any event, the matter which appears in appellee's brief at this point is simply a reiteration of certain of appellee's statements with which we have already dealt.

## 4. APPELLEE'S ANSWERS TO OUR ARGUMENTS (Appellee's Br. pp. 19-31).

### (a) Our Contention that Privity and Knowledge Are Established by this Record as a Matter of Law.

At page 19 of its brief, appellee asserts that we are contending that the judgment of the State Court is *res adjudicata* of the limitation of liability question. We are not so contending, but we do have the right to rely upon the admitted facts contained in the pre-trial order, which included Findings III, IV and V of the State Court. We do not contend that these findings standing alone compel the conclusion that there was privity or knowledge, but we do contend that those concededly binding findings, coupled with the clear showing which was made before the District Court of a failure to specifically instruct or warn appellee's employees as to the *hazards* associated with electrical malfunctioning and proper and safe means of coping with any such malfunctioning compelled a result opposite to that reached by the District Judge. Again, we are not asserting *res adjudicata,* but we do insist that the finding of the State Court that, "the aforesaid employees of defendant, Oldfield and Bunce, did not possess sufficient skill or understanding of things electrical so as to realize that the circuit breaker switch, by so tripping, was giving notice or warning of a defective or shorted condition in the said starboard deck light circuit * * *," which finding appellee, by the terms of the pre-trial order,

conceded to be binding upon it, is an established fact which is to be taken at full face value in these limitation proceedings.

### (b) Our Contention that the District Court Decision and Findings Are Clearly Erroneous as a Matter of Fact.

While we did not, in our opening brief, refer to the United States Supreme Court case of *McAllister v. U. S.,* 348 U. S. 19, 99 L.ed. 20, we demonstrated our familiarity with its holding, where, in our opening brief, at page 39, we said,

> "Be that as it may, however, we feel that this Court, on taking this case by its four corners, should be *left with a firm conviction* that appellee is not entitled to limitation of liability."

This is our position. We recognize the legal obstacles to the overturning of factual findings of a district court, and we can only hope that a consideration of this record and what we have said will leave this Court "with the definite and firm conviction that a mistake has been committed."

We again refer this Court to its decision in *States Steamship Co. v. U. S.,* 259 Fed. (2d) 458. The only distinction which appellee is able to draw between that case and the present situation is that in *States Steamship Co.* the court found that Supervisor Vallet had actual knowledge of the hazardous condition which caused the disaster, whereas in this case Supervisor Boyles denied actual knowledge of the hazard. This, we assert, is a distinction without a difference, for, as pointed out in *States Steamship Co.*

at page 466, "Knowledge means not only personal cognizance, but also the means of knowledge."

One further thing is relied upon by appellee at this place in its brief, that being the fact that this barge had undergone an annual inspection by the U. S. Coast Guard less than two weeks before this explosion. We respectfully direct the attention of this Court to Exhibit No. 4, being the Coast Guard Certificate relating to that inspection. This certificate incorporates the data concerning the inspection made, and clearly demonstrates that there was no attention whatsoever to the condition of the electrical systems on the barge. Rather, the inspection is wholly concerned with such matters as the sufficiency of the life-saving and fire-fighting equipment.

## 5. CONCLUSION.

Appellee has scarcely mentioned the State Court proceedings, whereas we earnestly contend that the evidence received in the District Court must be viewed in the light of and in harmony with the admitted facts contained in the pre-trial order and the binding State Court determination of liability which was necessarily based upon negligence of someone within appellee's organization. Upon so viewing the record, we are confident that this Court will be "left with a

firm conviction" that a mistake has occurred and that the District Court decree should be reversed.

Respectfully submitted,

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## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JEROME WILLIAMS
*Proctor*